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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

STATE OF ALABAMA,

PETITIONER

VS.

MARK ANTHONY SEELEY,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION OF THE STATE OF ALABAMA, PETITIONER

OF

JEFF SESSIONS, ATTORNEY GENERAL

AND

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48 pp

QUESTIONS PRESENTED

1. Does an officer, who has lawfully seized an opened package from a private shipper on the basis of probable cause to believe that the package contains contraband, violate the Fourth Amendment when he obtains a sample from the package and subjects it to a field test, without first obtaining a warrant?

2. In light of California v. Acevedo, (500 U.S. ___, 114 L. Ed 2d 619, 631ff, 111 S. Ct. 1982 [1991]), should this Honorable Court address the continuing confusion over the rule of which requires a warrant for the inspection of lawfully seized containers.

THE PARTIES

In the Circuit Court of Morgan County, Alabama, the Court of Criminal Appeals of Alabama, and the Supreme Court of Alabama, the parties were Mark Anthony Seeley, who is Respondent herein, as Defendant, Appellant, and Respondent, respectively, and the State of Alabama, who is Petitioner herein, as Plaintiff, Appellee, and Petitioner respectively.

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PETITION OF THE STATE OF ALABAMA,
PETITIONER

The State of Alabama, Your Petitioner respectfully prays that a writ of certiorari issue to review the opinion and orders of the Supreme Court of Alabama in the above cause.

OPINIONS AND ORDERS BELOW

The order of the Circuit Court of Marshall County, Alabama, refusing to suppress the evidence found and seized in this case is was not written.

The opinion of the Court of Criminal Appeals of Alabama, reversing the Circuit Court's order and remanding the cause is not yet reported, but will be reported as follows:

Seeley v. State

___ So. 2d ___ (Ala. Cr. App, 1995)

A copy of the same is submitted as Appendix "A" to this petition.

The order of the Supreme Court of Alabama denying certiorari and the dissenting opinion are not yet reported but will be reported as follows:

Ex parte State of Alabama

___ So. 2d ___ (Ala, 1995)

A copy of the same is submitted as Appendix "B" to this petition.

JURISDICTION

The order of the Supreme Court of Alabama denying certiorari was issued on September 22, 1995, and this petition is filed within ninety (90) days of said date. This Honorable Court's Jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Alabama Supreme Court believed that its decision was mandated by the Fourth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States. Your Petitioner is

making a claim under the same said provisions. Said constitutional provisions read as follows:

AMENDMENT IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

"AMENDMENT XIV

"Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

The issues in this case do not involve any statutory provisions.

Respondent Seeley was convicted of possession of cocaine under Section 13A-12-212, Code of Alabama, 1975. He was sentenced under Section 13A-5-6 of the same Code. Copies of these statutes are set out in Appendix "C" to this petition.

STATEMENT OF THE CASE

The Respondent, Mark Anthony Seeley, who will hereinafter be referred to as "Seeley", was indicted for trafficking in cocaine and excise tax evasion by the Grand Jury of Marshall County, Alabama, at its May, 1993, Term. (R. pp. 1A-2A)

On December 13, 1993, Seeley was arraigned on the indictment and pleaded not guilty. (R. pp. 1 and 16)

If Seeley filed a motion to suppress, it is not in this record. On April 18, 1994, the State filed a response to such a motion. Evidence on the same was heard on April 18, 1994, before Honorable William C. Gullahorn, a Circuit Judge. On hearing the evidence and argument of counsel,

Judge Gullahorn overruled the motion to suppress. (R. pp. 35-36 and Tr. pp. 1-81)

On May 2-4, 1994, the cause came on for trial. After a jury was struck, the Seeley withdrew his not guilty plea, and entered a plea of guilty to possession of cocaine.(R. pp. 3-4 and Tr. p. 83)

On June 22, 1994, Seeley was sentenced to seven years imprisonment, all but sixty days on probation. (R. pp. 5-7 and Tr. pp. 82-102)

Appeal followed. (Tr. p. 100)

On March 24, 1995, the Honorable Court of Criminal Appeals of Alabama reversed Seeley's conviction. The Court of Criminal Appeals correctly held:

> This case is controlled entirely by the United States Supreme Court's interpretation of search and seizure law as set

> out in United States v. Jacobsen, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). The facts in this case are remarkably similar to those in Jacobsen...." (Appendix "A", page 1-2)

The Court then immediately strayed into error writing:

> "...but the application of the principles of that case mandate a different outcome in this case...." (Ibid.)

On April 7, 1995, the State applied for rehearing raising the same claims which are presented by the instant petition. On May 5, 1995, the Court of Criminal Appeals denied rehearing without further opinion.

The State petitioned the Alabama Supreme Court for review by a writ of certiorari raising the issues presented by this petition. Certiorari was denied on

September 22, 1995, Justice Maddox submitted a dissenting opinion. (Appendix "B")

STATEMENT OF THE FACTS

The Court of Criminal Appeals, correctly found the facts as follows:

> "The state's evidence at the appellant's suppression hearing tended to show that on January 30, 1993, the Federal Express Courier service office in Madison, Alabama, received a package addressed to the appellant bearing a return address in Dallas, Texas. Fred Kaufmann, the Federal Express operations manager in Madison,

testified that they were unable to deliver the package because the courier had trouble finding the address and because the customer service agent was unable to contact the appellant by telephone. Apparently the telephone number that had been given as the appellant's was no longer in service.

"Kaufmann testified that if Federal Express cannot resolve a delivery problem through research, then it is a company practice to open the package to see if any other delivery information can be found. Kaufmann testified that he

opened the package. He testified that the package was about the size of a shoe box and that it was heavily wrapped in masking tape. Inside the package he found a tubular package wrapped in tape and packed in newspaper. Kaufmann testified that he smelled a strong odor similar to insecticide coming from the package. At that point he became suspicious and decided to call Officer Billy Ware, a narcotics officer with the Huntsville Police Department. He testified that he left the

package in the same condition it was in until Ware arrived.

"Ware testified that he arrived at the Federal Express office to inspect the package. Like Kaufmann, he testified that many substances are used to mask the smell of narcotics in packages-- e.g., herbicide, gasoline, diesel fuel, fabric softener and coffee. He then squeezed the tubular package and felt a powdery, granulated substance inside. Ware testified that he told Kaufmann that in his opinion the package contained narcotics. At that point, Ware called Officer

Michael Posey of the Huntsville Police Department K-9 unit and asked him to bring his narcotics detection dog to the office. Before Posey arrived, Ware placed the tubular package in a metal electrical box on the wall in the southeast section of the warehouse portion of the office.

"Posey testified that when he arrived, Ware instructed him to have the dog search the southeast section of the warehouse. Posey testified that the dog 'alerted' in the area of the electrical box where the package was located. Posey testified that an 'alert' occurs

when the dog smells narcotics. He said that the dog's breathing pattern changes but that at that point the dog has not yet pinpointed the location. When the dog finds the strongest source of the oder it will scratch or bite at that location. Posey testified that his dog scratched on the electrical box where the package was located. At that time, Posey pulled the dog off the search area and told Ware that there was a strong indication of narcotics in the electrical box where the package was hidden.

Ware then retrieved the package from the electrical box.

"Ware testified that he told Kaufmann that he was going to take the package to his office and he then signed a receipt for it. When Ware arrived at his office, he called the district attorney and explained how he came into possession of the package. After he talked with the district attorney, Ware opened the package and performed a field test on the white powder contained inside. Ware testified that the test gave a positive indication for the

presence of cocaine. Subsequent testing by the Alabama Department of Forensic Sciences proved that the powder was cocaine. He said that he then secured the package in his drug evidence locker.

"On Monday, February 1, 1993, someone from Federal Express telephoned to tell Ware that the appellant had telephoned Federal Express and that he wanted his package delivered. Ware began making arrangements with the Marshall County Sheriff's Department for a controlled delivery. Ware testified that in preparation

for the controlled delivery, he removed most of the cocaine powder the package. He then mixed about 1.4 ounces of baking soda with two or three grams of the cocaine powder and put that mixture in the package. Also, Ware borrowed a van and a courier's uniform from Federal Express in order to make the delivery.

"Ware telephoned the appellant on Monday and arranged to deliver the package on Tuesday, February 2, 1993, at a place in Marshall County near Guntersville. Ware met with three officers from the Marshall

County Sheriff Department's drug enforcement unit to execute the controlled delivery. These officers were Sonny Riddle, Paul Evans, and Martin Killion. Martin Killion wore the Federal Express uniform and drove the van to make the delivery while Ware, Riddle, and Evans waited nearby. Killion met the appellant at the designated location and delivered the package and the appellant signed for it, got in his car, and drove away. After the appellant had driven a few blocks, Ware, Riddle, and Evans stopped his car and arrested him. The

package was recovered from the appellant...." (Appendix "A", pages 2-9)

SUMMARY OF THE ARGUMENT

The conflict between the decision of the State courts in this case and the decisions of this Honorable Court is obvious.

This Court has overruled the rule of United States v. Chadwick, (433 U.S. 1, 53 L.Ed.2d 538, 97 S.Ct. 2476 [1977]), and Arkansas v. Sanders, (442 U.S. 753, 61 L.Ed.2d 235, 99 S.Ct. 2586 [1979]), because of the confusion generated by that rule and the minimal protection the rule gave to citizens. The rule of United States v. Chadwick and Walter v. United

States, (447 U.S. 649, 65 L.Ed.2d 401, 100 S.Ct. 2395 [1980]), generates at least as much confusion and provides no more protection to citizens.

The Chadwick - Walter rules is inconsistent with the relevant general law.

For these reasons, the rule should at least be limited to luggage and expressive materials.

ARGUMENT

REASON FOR GRANTING THE WRIT: CONFLICT WITH THE CONTROLLING DECISIONS OF THIS HONORABLE COURT, ESPECIALLY UNITED STATES V. JACOBSEN, 466 U.S. 109, 80 L.ED.2D 85, 104 S.Ct. 1652 (1984).

That the decision of the Court of Criminal Appeals of Alabama is in conflict with United States v. Jacobsen, (466 U.S. 109, 80 L.Ed.2d 85, 104 S.Ct. 1652 [1989]), is obvious. In the opening lines of its opinion, the Court of Criminal Appeals recognized that Jacobsen was controlling. In the next sentence, the Court described the facts in this case as, "...remarkably similar to those in Jacobsen...." (Appendix "A", pages 1-2) The relevant facts are actually

identical. The only difference between the facts in Jacobsen and those in this case is that, in Jacobsen the officers could see the white powder, while in this case they could only feel powder, but, in this case, the officers had the additional evidence provided by the drug dog. However, those facts relate to probable cause, and it is undisputed that, as in Jacobsen, the officers in this case had probable cause which authorized the seizure of the package.

The issue in Jacobsen, as in this case, was whether the officers, having lawfully seized the package pursuant to probable cause, could open the package and test its contents without first obtaining a search warrant. The Court of Criminal

Appeals misread the facts in Jacobsen to be that the private parties, rather than the government agents, opened the plastic bags of drugs. (Appendix "A", page 18) This was the key to that Court's decision, and was, quite simply, wrong. Jacobsen 466 U.S. 109, 111-112, 80 L. Ed 2d 85, 93. Was a warrant required? In Jacobsen, this Honorable Court said, "No"; in this case the Court of Criminal Appeals of Alabama said, "Yes." The conflict is obvious.

In California v. Acevedo, (500 U.S. ___, 114 L.Ed.2d 619, 111 S.Ct. 1982 [1991]), this Court overruled the rule of United States v. Chadwick, (433 U.S. 1, 53 L.Ed.2d 538, 97 S.Ct. 2476 [1977]) and Arkansas v. Sanders, (442 U.S. 753, 61 L.Ed.2d 235, 99 S.Ct. 2586 [1979]). The

Court pointed out that the Chadwick - Sanders rule had created an enormous amount of confusion for courts and law enforcement officers and provided little additional protection for citizens. California v. Acevedo, above, 114 L.Ed.2d 619, 632-634. The instant case involves the rule of United States v. Chadwick and Walter v. United States, (447 U.S. 649, 65 L.Ed.2d 410, 100 S.Ct. 2395 [1980]). The instant case demonstrates that the Chadwick - Walter rule generates at least as much confusion.

In the usual search and seizure situation, officers, first, search, then find and, finally seize weapons, evidence or contraband. If the search is lawful and there is probable cause to believe

that the items are subject to seizure, then the seizure is lawful. However, having lawfully seized an item, may the officer search the item itself? For example, if an officer lawfully searches an arrestee and lawfully seizes her purse or his wallet, may the officer examine the contents thereof? See Illinois v. Lafayette 462 U.S. 640, 77 L. Ed 2d 65, 103 S. Ct. 2605 (1983) and Snyder v. State 629 S.W. 2d 930, 29 A.L.R. 4th 755 (Tex.Cr.App, 1982). Or, suppose the State lawfully seizes records, may the records be lawfully examined by a federal agency? See United States v. Joseph 829 F. 2d 724 (9th Cir, 1987). Since a seizure is a greater infringement on the rights of the owner than a search, the logical

principle, "he who may do the greater may do the lesser", seems to dictate an affirmative answer. However, in United States v. Chadwick, above, this Honorable Court reached the opposite conclusion in the case of lawfully seized luggage.

In Chadwick, a locked footlocker was seized from a vehicle incident to a lawful arrest, taken to the federal building and searched without a warrant. The Court ruled that, although the government agents were authorized to seize the locker, transport it to the federal building, and retain custody of it and although there was clear probable cause to believe that the locker contained contraband, the agents were not authorized to search it without a warrant. Chadwick established

the principle that the fact that an item is lawfully seized and held as evidence, does not necessarily mean that it may be searched without a warrant. Chadwick established the principle that he who may do the greater may not necessarily do the lesser, and that sometimes one may seize but not search. It is the application of this "touch but don't look" concept, which has led to so much confusion and so much litigation.

In Arkansas v. Sanders, above, the Court extended the Chadwick rule to luggage which was actually in a vehicle when searched. The Court refused to extend the vehicle exception to the warrant requirement to luggage lawfully found in a vehicle.

Chadwick and Sanders both involved searches of lawfully seized luggage, and the general understanding at the time was that the rule was limited to luggage. In the year following Sanders, the Court handed down Walter v. United States, above. Walter did not involve luggage, but another item of special judicial concern, expression. In Walter, federal agents lawfully seized pornographic film. Citing concern for expression, (United States v. Walter, above, 447 U.S. 649, 655, 65 L. Ed 2d 410, 417), this Court ruled that the agents should have obtained a warrant before viewing the film. Thus, it appeared that lawfully seized luggage and expressive materials could not be searched without a warrant.

Whatever else might be said about the Chadwick - Sanders - Walter Rule, at least the luggage and expression limitation provided a black line for police officers and courts. Whenever these materials were involved, they knew that a special rule applied.

Then came Robbins v. California, (453 U.S. 420, 69 L. Ed 2d 744, 101 S. Ct. 2841 [1981]), and New York v. Belton, (453 U.S. 454, 69 L. Ed 2d 768, 101 S. Ct. 2860 [1981]), which were decided the same day. Neither Robbins nor Belton involved luggage or expressive materials. Robbins involved plastic wrapped around a quantity of contraband in the trunk of a vehicle; Belton involved a jacket found on the back seat of a vehicle. The Court applied the

Chadwick, "luggage rule" to the wrapping in Robbins, but declined to apply it to the jacket in Belton.

The following year, the Court sought to settle the confusion generated by Robbins and Belton in United States v. Ross, (456 U.S. 798, 72 L.Ed 2d 572, 102 S. Ct. 2157 [1982]). Ross provided a good opportunity for the Court to draw a distinction between luggage and other containers, since the case involved two containers - a brown paper bag, which was clearly not luggage, and a red leather zippered pouch, which could be considered luggage. (456 U.S. 798, 72 L. Ed 2d 572, 579) However, the Court rejected a distinction between "worthy and unworthy containers", (456 U.S. 798, 822, 72 L. Ed

2d 572, 592). In Ross, the Court ruled that, if there is probable cause to search a vehicle, all parts as to which there is probable cause may be searched, as well as any containers in the vehicle as to which probable cause exists. The Court recognized that this holding precluded the results reached in Arkansas v. Sanders, above, and Robbins v. California, above, but did not overrule those cases. (456 U.S. 798, 824, 72 L. Ed 2d 572, 593) This, of course, led to even more confusion. This confusion was further exacerbated three years later when an equally decided court affirmed the decision and opinion of the Oklahoma Court of Criminal Appeals in Castleberry v. State, (678 P. 2d 720 [Okl. Cr.App, 1984]), in Oklahoma v. Castleberry

(471 U.S. 146, 85 L. Ed 2d 112, 105 S. Ct. 1859 [1985]). Hopefully, this confusion is now cleared by California v. Acevedo, above, which as noted, overruled the Chadwick - Sanders Rule.

The instant case was not decided under the Chadwick - Sanders - Robbins and Belton line of cases, but under the Chadwick - Walter - Jacobsen line.

The bases of Walter v. United States, which the Eighth Circuit followed in United States v. Jacobsen (683 F. 2d 296, 299 [8th Cir, 1982]), and which the Honorable Court of Criminal Appeals of Alabama inadvertently followed in this case, were Chadwick, (United States v. Walter 447 U.S. 649, 654, 65 L. Ed 2d 410, 416-417), and concern for expressive

materials, (Ibid, 447 U.S. 649, 655, 65 L., Ed 2d 410, 417). The materials involved in Jacobsen did not involve expression in any sense, so in applying Walter in Jacobsen, the Eighth Circuit apparently viewed Walter as a general extension of Chadwick. In reversing the Eight Circuit, this Honorable Court limited Walter to its facts. United States v. Jacobsen 466 U.S. 109, 115-118, 80 L. Ed 2d 85, 95-97, 104 S. Ct. 1652 (1984) However, at the root of the problem in Jacobsen is the Chadwick "seize but don't search" or "touch but don't look" rule.

One problem with Chadwick, is that it requires officers to act in a manner which is inconsistent with human nature. If an

officer has probable cause to believe that certain contraband is concealed in a container, his or her natural response would be, not to seize the container, but to open it and see if the contraband is, in fact, present. And if it is, then seize the container.

Another problem, is: Just how much protection does Chadwick actually give citizens? In the situation we describe above, if the officer were to comply with Chadwick and seize the container and go for a warrant, the innocent owner would be deprived of his property for the length of time it takes to get a warrant. If an immediate search discloses no contraband, the property can be immediately restored to the owner. Finally, if the officer

violates Chadwick, and opens the container, and finds contraband, he or she can still obtain a valid search warrant for the container on the basis of the information he or she had prior to opening the container. Sequra v. United States, 468 U.S. 796, 82 L.Ed.2d 599, 104 S.Ct. 3380 (1984); Murray v. United States, 487 U.S. 533, 101 L.Ed.2d 472, 108 S.Ct. 2529 (1988) Thus, Chadwick - Walters provides little protection to a citizen whose property is already lawfully seized. Compare California v. Acevedo, above 114 L.Ed.2d 619, 631-632.

In the instant case, it is most difficult to see how Respondent Seeley would have been better off, if Officer Ware, before testing the material, had

obtained a search warrant and served it on himself or the custodian of the police evidence safe.

Finally, we submit that Chadwick - Walters is inconsistent with the relevant general law. Under Chadwick, certain containers may not be searched, without a warrant, even though they are lawfully seized and are lawfully in police custody. However, the general rule is that property which is lawfully in police custody may be searched without a warrant. E. g. Ex parte Hilley 484 So. 2d 485 (Ala, 1985); Marquez v. State 754 P. 2d 705 (Wyo, 1988); MacLaird v. State 718 P. 2d 41 (Wyo, 1986) Perhaps most striking of all is that, while Chadwick holds that containers in police custody can not be

search without a warrant, persons in police custody may be search without a warrant. Illinois v. Layfette 462 U.S. 640, 77 L. Ed 2d 65, 103 S. Ct. 2605 (1983); United States v. Robinson 414 U.S. 218, 38 L. Ed 2d 427, 94 S. Ct. 467 (1973). Gustafson v. Florida 414 U.S. 260, 38 L. Ed 2d 456, 94 S. Ct. 488 (1973) This is the sort of inconsistency at the level of practical application which so confuses police officers.

We submit that this Honorable Court should re-examine the Chadwick - Walters rule and at least limit it to its original fields of of application, luggage and expressive materials.

CONCLUSION

In conclusion your Petitioner, the State of Alabama, respectfully submits that in this case the Supreme Court of Alabama erroneously ruled contrary to the decisions of this Honorable Court. In addition, this case provides an opportunity to clarify the Chadwick - Walter rule.

Therefore, Your Petitioner prays that this Honorable Court will issue a writ of certiorari and will review the matters complained of and reverse the decision of

Supreme Court of Alabama.

Respectfully submitted,

JEFF SESSIONS

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